IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1557

EARL A. GARNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner Earl A. Garner respectfully requests that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit has not yet been officially reported. It is annexed to this Petition as Appendix A. A related case, *United States v. West*, Nos. 76-1837 through 76-1843 (4th Cir., Feb. 13, 1978) is annexed as Appendix B.

JURISDICTION

The Court entered judgment on February 17, 1978, and, after Garner's Petition for Rehearing, revised its Opinion on March 30, 1978. This Petition is timely filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, under the Confrontation Clause and the Federal Rules of Evidence, a lengthy transcript of grand jury testimony of the government's leading witness may be introduced at trial, where the witness, though physically present, does not testify at trial and the grand jury testimony is the exclusive source of evidence on two counts against the defendant.

2. Whether, in light of the Court's decision this Term in *Simpson v. United States*, the Court of Appeals was correct in following decisions in the Fifth and Ninth Circuits, and rejecting those from the First and Sixth Circuits, by holding that a defendant who is convicted of conspiracy to import heroin under 21 U.S.C. §963 and conspiracy to possess heroin with intent to distribute it under 21 U.S.C. §846 may be sentenced consecutively where the convictions resulted from the same conduct.

STATUTORY AND CONSTITUTIONAL PROVISIONS

Statutory and Constitutional provisions relevant to the Petition are United States Constitution Amendment VI; 21 U.S.C. §846; 21 U.S.C. §963; Fed. R. Evid. 804(b). They are set forth in full in the Appendix.

STATEMENT OF THE CASE

Earl Garner was convicted and sentenced to a thirty year term of imprisonment almost exclusively on the basis of the grand jury testimony of a witness who did not testify at trial and who was never subjected to cross examination. Garner was indicted in the Eastern District of Virginia along with co-defendant Everett McKethan on two counts of narcotics conspiracy, conspiracy to import heroin under 21 U.S.C. §963 and conspiracy to possess with intent to distribute heroin under 21 U.S.C. §846. The indictment charged that in late 1974 and early 1975 the two defendants were engaged in a scheme to import heroin into the United States for purposes of distribution. In addition, Garner was charged with two substantive counts of narcotics importation under 21 U.S.C. §952(a) and 18 U.S.C. §2.

In order to establish Garner's guilt on one of the substantive counts of importing heroin from Europe in October, 1974, the government introduced the testimony of one Mary Ann McKee. From her evidence, the jury might have found Garner guilty of a single count of narcotics importation. The remainder of the government's case against Garner on the two conspiracy counts, and the foundation for the introduction of critical documentary evidence of certain European trips by Garner, consisted of the grand jury testimony of a man named Warren Robinson. Robinson refused to testify at trial, however, without giving a reason and despite warnings from the court, a grant of immunity, an order to testify and threats of severe punishment if he did not. (App. 112; 127-150; 162-165; 169-70). [1]

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[1] References are to the Appendix to Garner's Court of Appeals Brief.

When it became clear that Robinson's testimony would not be forthcoming, the court suggested that the government tender testimony Robinson had given to the grand jury for admission into evidence (App. 136-37), pursuant to Rule 804(b)(5) of the Federal Rules of Evidence, the residual hearsay exception applicable to statements from unavailable witnesses. The court later offered its view that Rule 804(b)(5) "obviates or supercedes" exceptions (b)(1) through (b)(4), the traditional hearsay exceptions for prior testimony subject to cross examination, statements against interest, dying declarations and statements of family or personal history. (App. 181). Before reading the testimony, the court decided that Robinson's testimony had equivalent guarantees of trustworthiness as recognized hearsay exceptions simply because it was given under oath. (App. 189-90). The court dispensed with the pretrial notice requirement of Rule 804(b)(5), deciding that this requirement could be satisfied by deferring a final ruling on the admissibility of the grand jury testimony until the following day. (App. 184-93).

Robinson had testified before a grand jury on January 7, 1976, as part of an agreement with the government pursuant to which he was permitted to plead guilty to a lesser offense arising out of a narcotics charge which had been brought against him. His grand jury testimony tended to implicate Garner and McKethan in a heroin importation conspiracy. (App. 23-76). Over the course of more than forty transcript pages, Robinson told the grand jury that he, Garner and McKethan began a series of five trips in the summer of 1974 for the purpose of importing heroin into the United States and selling it in the Washington area. Yet the testimony was permeated with leading questions, hearsay, multiple hearsay, questions lacking a proper foundation, and other evidentiary infirmities prohibited at trial but common to grand jury

testimony. Robinson was present on only two of the five trips about which he testified, and much of his information came second and third hand (and never from Garner). Indeed, the travel documents the government itself introduced at trial contradicted Robinson in material respects, especially as to the three trips at which Robinson was not present.[2]

On the second day of trial, recognizing the problem the defendants faced without the opportunity to cross examine Robinson, the prosecutor expressed serious doubt about the admissibility of the grand jury testimony and stated:

> . . . I think what we get into in this area is the question of due process, and that is that the evidence must have enough reliability to satisfy the requirement that a person can be convicted upon substantial evidence. (App. 243).

The prosecutor accordingly declined to offer Robinson's grand jury testimony (App. 263, 265). His decision, however, was overruled by his superiors, and the government then tendered the grand jury testimony. The court

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[2] Robinson stated, for example, that the scheme began when Garner and McKethan travelled to Europe without Robinson, met a narcotics contact in Europe, and Garner brought heroin back into the United States (App. 24-29). The documentary evidence, however, showed that no such trip ever took place (Govt. Ex. 2, 4). On two other trips, in December, 1974 and January, 1975, Robinson testified about drug transactions allegedly involving Garner and McKethan in Europe, but the documents showed that the two men were not in the same place at the time of the conversations or transactions. *Compare* App. 47-48, 56-60 *with* 616-618 and Govt.Ex. 26a, 26c, 26d, 27a.

McKee accompanied Garner and Robinson on a trip to Europe in which she became a courier for heroin. But she had never met Garner before, and did not testify what Garner did on the trip; she only said he was present. (App. 202-218).

admitted the testimony (App. 277), including all hearsay and leading questions about all five trips,[3] and it was read to the jury. The court then recalled Robinson for "cross-examination" concerning his grand jury testimony. He continued to refuse to testify except to state that the testimony was a "mistake" and that the testimony was "untrue." (App. 403-413).[4]

The jury convicted Garner on both conspiracy counts and on one substantive count. The court sentenced him to a consecutive ten year term of imprisonment on each count, plus a consecutive special parole term of three years on each count.

A divided Court of Appeals affirmed Garner's conviction. The majority based its decision primarily on a related case, *United States v. West*, ___ F.2d ___ (4th Cir., Feb. 13, 1978) (Annexed as Appendix B), decided a few days before this one, which held that the exclusive test for the admissibility of grand jury testimony under both Rule 804(b)(5) and the Sixth Amendment is its trustworthiness. Here, the majority found the entire grand jury testimony reliable because one small section of it was corroborated by McKee, and because there was "evidence" (the foundation of which was the grand jury testimony itself) that the defendants had travelled to Europe.

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[3] After the court admitted the grand jury testimony, it allowed specific objections to parts of the transcript which were otherwise objectionable. (App. 283-322). Garner objected to many portions of the testimony which contained leading questions, hearsay, multiple hearsay and unintelligible and unresponsive answers; the court, however, sustained only the one objection which the government agreed was correct. (App. 287-88).

[4] With respect to Robinson's recall and denial of the truth of the testimony, the Court of Appeals correctly held that the few questions Robinson answered when recalled did not satisfy the requirements of the Confrontation Clause for cross-examination. *Infra*, at 13a.

Judge Widener dissented on the basis of his opinion in *United States v. West*, in which he rejected three central aspects of the majority's holding. He criticized the majority for adopting so undemanding a standard or reliability in weighing the trustworthiness of the testimony under the Rules of Evidence; for admitting, over a Confrontation Clause objection, extensive hearsay evidence which was not even within a recognized hearsay exception; and for refusing to distinguish between standards of admissibility which apply under the Rules of Evidence and those which apply under the Confrontation Clause. Judge Widener explained:

> I see the use of Brown's grand jury testimony to be no more than the disreputable trial by affidavit, the very cause of the Confrontation Clause. *Infra*, at 41a.

The Court of Appeals also affirmed Garner's consecutive conspiracy count sentences from the same conduct and for which the government's proof was the same. It recognized that the circuits were evenly split on the question,[5] and adopted the view that Congress permitted such consecutive sentences, though neither the Fourth Circuit nor any other court ever discussed the legislative history of the two statutes.

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[5] *United States v. Houltin*, 525 F.2d 943 (5th Cir. 1976) *vacated sub nom. Croucher v. United States*, 429 U.S. 1034 (1977), *modified* 553 F.2d 991 (1977) (permitting consecutive sentences); *United States v. Marotta*, 518 F.2d 681, 685 (9th Cir. 1975) (permitting consecutive sentences); *United States v. Honneus*, 508 F.2d 566 (1st Cir. 1974) *cert. denied*, 421 U.S. 948 (1975) (prohibiting consecutive sentences); *United States v. Adcock*, 487 F.2d 637 (6th Cir. 1973) (prohibiting consecutive sentences).

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD RESOLVE A CONFLICT OF CIRCUITS ON THE COMPELLING QUESTION WHETHER THE FEDERAL RULES OF EVIDENCE OR THE CONFRONTATION CLAUSE PERMIT CONVICTIONS ON CONSPIRACY CHARGES ON THE BASIS OF GRAND JURY TESTIMONY ALONE

This case raises in a dramatic fashion one of the fundamental issues of procedural justice, whether the lack of opportunity to cross examine the government's leading witness is tantamount to conviction by a "paper transcript," *Dutton v. Evans*, 400 U.S. 74, 87 (1970), or trial by affidavit. It also presents the question whether a "residual" hearsay exception contained in the Federal Rules of Evidence may be construed to allow a criminal conviction on two narcotics conspiracy counts by hearsay grand jury testimony alone. These questions, which have brought widely divergent answers in the circuits, have such vast consequences for the adversary system that they must be answered by this Court.

In the past, it was extremely rare for the government to attempt to introduce into evidence grand jury testimony of a witness unavailable for trial. As a glance at the testimony here demonstrates so well, grand jury testimony is invariably taken in an atmosphere in which the prosecutor leads the witness, suggests answers, cajoles and often coerces. There is no hint of cross examination. Hearsay and multiple hearsay answers are common, even invited by the prosecutor for investigative reasons. Finally, it is given out of the defendant's presence; as Judge Widener observed in dissent in *United States v. West*, ___ F.2d ___ (4th Cir., Feb. 13, 1978):

> [W]e must recognize that a witness will often make accusations behind the back of the accused which he will not repeat to his face. *Infra at 42a.*

For these reasons, its use at trial, except as a prior inconsistent statement, has long been forbidden.

Now, however, in a radical break with the past, the government routinely attempts to introduce grand jury testimony where a witness is not available. These attempts are premised on a hearsay exception in the Federal Rules of Evidence governing statements not specifically covered by any traditional hearsay exception. Fed. R.Evid. 804(b)(5). That narrowly drawn rule permits such statements to be admitted only if certain conditions are met. These conditions require that the statement contain equivalent guarantees of trustworthiness equivalent to those of traditional exceptions, that notice of its proposed use be given to the opposing party, and that the general purpose of the Rules of Evidence and the "interests of justice" will best be served by admission of the testimony.

The question here is whether the catch-all exception, with its explicit qualifications and limitations was intended by Congress — and thus may be interpreted — to be an open-ended invitation to the government to obtain a conviction through the use of grand jury testimony when a witness is not available. The question is compelling not only because it concerns the scope of the use of hearsay in federal trials, but also because the conclusion of the majority below destroys a criminal defendant's Constitutional right to confront witnesses against him.

The question has received conflicting answers in courts of appeals. Besides the majority here, one circuit has held that Rule 804(b)(5) may permit admission of a witness' grand jury testimony, *United States v. Carlson*, 547 F.2d

1346 (8th Cir. 1976), *cert. denied,* 413 U.S. 914 (1977). Another circuit arrived at the opposite result, suggesting that Rule 804(b)(5) rarely, if ever, permits use of grand jury testimony at trial under these circumstances. *United States v. Gonzalez,* 559 F.2d 1271 (5th Cir. 1977). Neither of these decisions reached the Confrontation Clause issue. On the other hand, the Second Circuit, in an opinion by Judge Friendly, has held that, aside from any considerations under applicable rules of evidence, the admission of the grand jury testimony of a witness who never testifies at trial is forbidden by the Confrontation Clause of the Sixth Amendment. *United States v. Fiore,* 443 F.2d 112 (2d Cir. 1971).

A. This Court Should Resolve The Proper Scope Of The Residual Hearsay Exception In The Federal Rules Of Evidence, Which Has Had Varying Interpretations In The Circuits.

The drafters of the Federal Rules of Evidence did not want to freeze the law of hearsay in the form of the codified list of hearsay exceptions appearing in Rules 803 and 804 of the Federal Rules of Evidence. They proposed to allow new hearsay exceptions to emerge gradually, but under tight restrictions, to cover "new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions." Advisory Comm. Notes on Proposed Fed. R. of Evid., 4 *Weinstein's Evidence* 803-55 (1977). The exception was further narrowed in Congress. The Senate Judiciary Committee specifically warned that the exception was intended by the Senate Judiciary Committee to be used "very rarely, in only exceptional circumstances." The Committee did not "intend to establish a broad license for trial judges to admit hearsay"

not otherwise admissible under the Rules. Sen.Rep.No. 93-1277, 93rd Cong., 2d. Sess., at 20 (1974).

The Fifth Circuit has been faithful to the intended scope of Rule 804(b)(5), holding, in circumstances similar to these – without cross examination, replete with leading questions from the prosecutor which would be prohibited at trial and given under compulsion – that the proferred grand jury testimony was inadmissible under the Rule even if crucial to the government's case. *United States v. Gonzalez,* 559 F.2d 1271 (5th Cir. 1977). The court explained further that an oath as a protection against perjury loses all significance where a witness is testifying under a grant of immunity.

In the Fourth and Eighth Circuits, in contrast, the residual hearsay exception has had the opposite of its intended effect, permitting grand jury testimony an unexpected vehicle for admissibility. Both the majority below and in *United States v. Carlson,* 547 F.2d 1346 (8th Cir. 1976), *cert. denied,* 413 U.S. 914 (1977) essentially treated the residual hearsay exception as a license to admit whatever the court chooses into evidence.

That conflict alone would warrant a grant of Certiorari. The issue involved, however, requires more than the resolution of a conflict of circuits. It concerns the scope of the hearsay exception containing the explicit limitation that the evidence profferred must be as reliable as traditional hearsay exceptions, most of which have evolved over decades and even centuries. To apply that standard to an entire grand jury transcript, itself full of hearsay and leading questions, on the basis of "corroboration" of a small fraction of it, ignores the language and legislative intent of the Rule. If the views of the Fourth and Eighth Circuits prevail, one would have to agree with the

District Judge here that those exceptions "obviate or supercede," all other hearsay exceptions. This Court should not permit that interpretation, so contrary to the letter, spirit and intent of the Federal Rules of Evidence, to stand.

B. The Conspiracy Convictions Below, Based on Grand Jury Testimony Alone, Conflict With The Values Protected By The Confrontation Clause, The Decisions Of This Court, And A Decision Of The Second Circuit.

The admission of Robinson's grand jury testimony was in derogation not only of the Federal Rules of Evidence, but also of the Confrontation Clause of the Sixth Amendment. *See Dutton v. Evans,* 400 U.S. 74 (1970). The critical measure of compliance with the Confrontation Clause is cross examination: prior testimony of a witness, though hearsay, may be admitted substantively against the defendant, but only if the witness is available to be cross examined at some time either about the statements, *California v. Green,* 399 U.S. 149 (1970), or about the underlying events, *Nelson v. O'Neil,* 402 U.S. 622 (1971).

If cross examination is not possible, the Confrontation Clause precludes admission of prior testimony. *Pointer v. Texas,* 380 U.S. 400 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1965). Besides being in obvious conflict with the cited cases, the majority's decision here conflicts directly with the decision of the Second Circuit in *United States v. Fiore,* 443 F.2d 112 (2d Cir. 1971).

The majority below adopted the theory that trustworthiness is always a substitute for cross examination, treating the Confrontation Clause as congruent with Rule 804(b)(5). In reaching that conclusion, it relied on a serious misreading of *Dutton v. Evans,* 400 U.S. 74

(1970). In *Dutton*, the court admitted the statement because (1) it contained no assertion of a past fact, (2) it was based on the declarant's personal knowledge, (3) it was unlikely to have been a result of faulty recollection and (4) it was unlikely that the declarant was lying. Thus the Court concluded that cross examination would have performed no useful function in determining the truth of the statement. 400 U.S. at 88-89. The circumstances here were as far removed from those in *Dutton* as imaginable: Robinson, who was testifying under a plea agreement and threats of further prosecution, testified exclusively about (1) past events and (2) matters of which he knew only second or third hand and (3) then denied the truthfulness of that testimony. Cross examination at trial would have thoroughly impeached the witness.

The majority misread *Dutton* in yet another respect as well. *Dutton* held that where cross examination is not possible but the statement proposed to be admitted is within a recognized hearsay exception, the Confrontation Clause requires not only that the statement be trustworthy, but that the statement not be the government's whole case. For confrontation has a rich, literal meaning, to face, question and have the chance to unmask one's accuser. Thus no matter how "trustworthy" evidence may be, the right of confrontation implies that in the absence of cross examination, hearsay may not be the fulcrum of the government's case, "crucial" or "devastating" to the defendant. In *Dutton's* apt words, a man cannot be convicted, as Garner was here on two conspiracy counts, on the basis of a "paper transcript." 400 U.S. at 87.

Other courts of appeals have performed an analysis of the role hearsay plays in the government's case in a crim-

inal prosecution and have engaged in especially careful examination of profferred evidence not within a recognized hearsay exception. *See, e.g., United States v. Rogers,* 549 F.2d 490, 500-502 (8th Cir. 1976), *cert. denied,* 431 U.S. 918 (1977); *United States v. Yates,* 524 F.2d 1282 (D.C.Ci.. 1975). To abandon the analysis in *Dutton,* as the majority did here, marks a change in the kind of evidence the system of justice will tolerate to support a conviction. But it does more as well, abandoning as it must the traditional adversarial notion of justice, which for so long has been the expression of principles precious to the Constitution. That interpretation of the sixth amendment, allowing such a transformation to occur, requires review by this Court.

II.

THIS COURT SHOULD RESOLVE A CONFLICT IN THE CIRCUITS WHETHER CONSECUTIVE SENTENCES MAY BE IMPOSED FOR CONVICTIONS UNDER SEPARATE NARCOTICS CONSPIRACY STATUTES ARISING OUT OF A SINGLE COURSE OF CONDUCT.

Garner received two consecutive ten year sentences for convictions under separate conspiracy statutes, conspiracy to import heroin (21 U.S.C. §963) and conspiracy to distribute heroin (21 U.S.C. §846). Despite the fact that the government's evidence suggests the existence of a single ongoing conspiracy and that *Braverman v. United States,* 317 U.S. 49 (1972) therefore requires that he be sentenced only once for that conspiracy, the Fourth Circuit affirmed his consecutive sentences. As a result of that decision, there now exists a three to two split among the circuits on whether consecutive sentences are sustainable under these conspiracy statutes.[6]

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[6]The Fourth, Fifth and Ninth Circuits permit consecutive sentences; the First and Sixth Circuits forbid them. *See* n.5, *supra.*

A resolution of the conflict should be made in light of *Simpson v. United States*, ___ U.S. ___, 46 U.S.L.W. 4159 (1978), where this Court held that before even addressing the double jeopardy question such sentences raise, courts should determine whether Congress intended to subject the defendant to multiple penalties for a single criminal transaction. Despite the fact that the Fourth Circuit decision here took note of *Simpson*, it failed to examine the relevant Congressional intent. Instead, it relied on *United States v. Houltin*, 525 F.2d 943 (5th Cir. 1976), *vacated sub. nom. Cloucher v. United States*, 429 U.S. 1034 (1977), *modified*, 553 F.2d 991 (5th Cir. 1977). But the court in *Houltin* merely cited *United States v. Marotta*, 528 F.2d 681, 685 (9th Cir. 1975), as supporting the proposition that since there exist two statutes under which a defendant's involvement in a conspiracy could be charged, Congress must have intended to provide dual punishments. That reasoning, of course, begs the question. It is agreed that there exist two statutes covering the same behavior; the issue is whether Congress intended that they be used to impose consecutive sentences.

The legislative history shows no evidence of any such intent. The two provisions, though both a part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236 (1970), were drafted by separate congressional committees with different concerns and different jurisdiction. See H.Rep. 91-1444, 91st Cong., 2d Sess. (1970). Nowhere in that Report or elsewhere in the legislative history is there any explanation of the relation of the two provisions, much less an expression of intent to authorize separate punishments for the same transaction.

Further, *Simpson* required that the principal that ambiguous criminal statutes be construed in favor of lenity, *United States v. Bass*, 404 U.S. 336 (1971); *Rewis v. United States*, 401 U.S. 808 (1971), be applied particularly where multiple penalties may follow from a single source of conduct. *See Bell v. United States*, 349 U.S. 81 (1955); *Ladner v. United States*, 358 U.S. 169, 178 (1958). Absent a very clear intent by Congress, Garner's consecutive conspiracy count sentences should never have been permitted.

Thus, in resolving the conflict in circuits, the Fourth Circuit should have engaged in the analysis required by *Simpson* and vacated one of Garner's sentences. Not having done so, the serious double jeopardy problems discussed in *Simpson* appear, but these questions as well were not addressed by the court below. Because of the conflict in circuits and the disinclination of the court below to engage in the analysis required by *Simpson*, the Court should grant Certiorari.

CONCLUSION

For the foregoing reasons, petitioner urges that this Court issue a Petition for Certiorari to review the decision below.

Respectfully submitted,

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